No. 89-369

Supreme Court, U.S.
FILED
NOV 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

MARTIN W. MATZEN
DAVID C. SHILTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, if we assume that there is a four-month time limit for Environmental Protection Agency (EPA) review of revised state implementation plans (SIPs) under Section 110(a)(3)(A) of the Clean Air Act (42 U.S.C. 7410(a)(3)(A)), the proper remedy for noncompliance is to bar the United States from bringing or continuing an enforcement action against a source of pollutants for violating the terms of the existing SIP.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987)	6, 7, 8, 11
Brock v. *Pierce County*, 476 U.S. 253 (1986)	13
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	3
Cook v. *Hudson*, 429 U.S. 165 (1976)	15
Costle v. *Pacific Legal Foundation*, 445 U.S. 198 (1980)	10
Council of Commuter Organizations v. *Gorsuch*, 683 F.2d 648 (2d Cir. 1982)	8
Council of Commuter Organizations v. *Thomas*, 799 F.2d 879 (2d Cir. 1986)	8
Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977)	8
Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983)	6-7, 8, 11
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977)	13
Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955)	15
Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975)	2, 11
Triangle Improvement Council v. *Ritchie*, 402 U.S. 497 (1971)	15
TVA v. *Hill*, 437 U.S. 153 (1978)	13
United States v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280 (W.D. Ky. 1988), appeal pending, No. 88-6300 (6th Cir.)	9, 14

Cases—Continued: Page

United States v. *Ford Motor Co.*, 814 F.2d 1099 (6th Cir.), cert. denied, 484 U.S. 822 (1987) 11
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985) 8-9

Statutes:

Administrative Procedure Act:
5 U.S.C. 555(b) 9
5 U.S.C. 706(1) 10
Clean Air Act, 42 U.S.C. 7401 *et seq.*:
§ 108, 42 U.S.C. 7408 2
§ 109, 42 U.S.C. 7409 2
§ 110(a)(1), 42 U.S.C. 7410(a)(1) 2
§ 110(a)(2), 42 U.S.C. 7410(a)(2) 2, 9, 10
§ 110(a)(2)(A), 42 U.S.C. 7410(a)(2)(A) 2
§ 110(a)(2)(I), 42 U.S.C. 7410(a)(2)(I) 2
§ 110(a)(3)(A), 42 U.S.C. 7410(a)(3)(A) 2, 5, 8, 9, 10
§ 110(d), 42 U.S.C. 7410(d) 2, 11
§ 113, 42 U.S.C. 7413 ..... 5, 11, 13, 14
§ 113(a), 42 U.S.C. 7413 (a) 3
§ 113(b), 42 U.S.C. 7413(b) 3, 10
§ 113(b)(2), 42 U.S.C. 7413(b)(2) 10-11, 13
§ 113(c), 42 U.S.C. 7413(c) 3
§ 113(d), 42 U.S.C. 7413(d) 4-5
§ 120, 42 U.S.C. 7420 ..... 3, 14
§ 120(d)(2), 42 U.S.C. 7420(d)(2) 3
§ 120(d)(3)(C)(ii), 42 U.S.C. 7420(d)(3)(C)(ii) 3
§ 171(2), 42 U.S.C. 7501(2) 2
§ 172(b), 42 U.S.C. 7502(b) 2
§ 172(b)(2), 42 U.S.C. 7502(b)(2) 5
§ 307(b)(1), 42 U.S.C. 7607(b)(1) 12
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 2
Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 2

Miscellaneous: Page

46 Fed. Reg. (1981):
p. 51,386 4
p. 51,387 4
51 Fed. Reg. 43,394 (1986) 5
54 Fed. Reg. 2214 (1989) 16
H.R. 99, 101st Cong., 1st Sess. (1989) 14-15
H.R. 2323, 101st Cong., 1st Sess. (1989) 15
H.R. 3030, 101st Cong., 1st Sess. (1989) 15
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) 12
S. 1490, 101st Cong., 1st Sess. (1989) 15
S. 1630, 101st Cong., 1st Sess. (1989) 15

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-369

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 876 F.2d 1060. The opinion of the district court (Pet. Supp. App. SA1-SA7) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on June 7, 1989. The petition for a writ of certiorari was filed on September 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Amendments of 1970 (Pub. L. No. 91-604, 84 Stat. 1676) charge EPA with responsibility for establishing National Ambient Air Quality Standards (NAAQS) for pollutants which cause or contribute to air pollution. §§ 108, 109, 42 U.S.C. 7408, 7409. Section 110(a)(1) of the Clean Air Act requires each State to develop and submit to EPA for approval, within nine months after EPA's promulgation of NAAQS, an implementation plan designed to achieve and maintain the NAAQS within the State. 42 U.S.C. 7410(a)(1). Section 110(a)(2), in turn, requires EPA, within four months of receiving the original state implementation plan (SIP), to determine whether the SIP meets certain statutory requirements (42 U.S.C. 7410(a)(2)), including attainment of applicable primary NAAQS "as expeditiously as practicable" but generally no later than three years from the date of approval of the SIP. 42 U.S.C. 7410(a)(2)(A). Section 110(a)(3)(A) requires EPA to approve revisions to existing SIPs if EPA determines that the revised SIP meets the requirements applicable to original SIPs. 42 U.S.C. 7410(a)(3)(A). Sources of pollutants are subject to the existing SIP, however, until the proposed revision is approved by both the State and EPA. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975); 42 U.S.C. 7410(d). Unlike Section 110(a)(2), Section 110(a)(3)(A) contains no express time limit for acting on revisions.

The Clean Air Act Amendments of 1977 (Pub. L. No. 95-95, 91 Stat. 685) added further requirements for SIPs applicable to "nonattainment area[s]"—areas where air quality falls short of the NAAQS. See Sections 110(a)(2)(I), 171(2), 172(b), 42 U.S.C. 7410(a)(2)(I), 7501(2), 7502(b). The

Amendments required each State containing a nonattainment area to prepare and secure EPA approval of a new SIP by July 1, 1979; the deadline for actual attainment of the primary NAAQS was extended to December 31, 1982, and further extensions were permitted in some cases to December 31, 1987, but the SIPs for non-attainment areas were required to contain provisions designed to achieve the NAAQS as expeditiously as possible. See generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 849 (1984).

Section 113(a) of the Act authorizes EPA to issue a notice to any person who is violating a SIP, and, if the violation extends beyond 30 days after notice, to enforce the SIP by issuing an administrative order or instituting a civil action. 42 U.S.C. 7413(a). Injunctions, civil penalties of up to $25,000 per day of violation, and criminal penalties for knowing violations are authorized. 42 U.S.C. 7413(b) and (c). In determining the amount of a civil penalty, the district court is directed to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. 7413(b). An additional means of enforcement is provided in Section 120 (42 U.S.C. 7420). Under Section 120, EPA may administratively assess a noncompliance penalty against any major stationary source in violation of SIP emission limits. The penalty begins to accrue when EPA issues a notice of noncompliance, and is intended to remove the economic benefit of delayed compliance. 42 U.S.C. 7420(d)(2) and (3)(C)(ii).

2. The entire State of Massachusetts is a nonattainment area for the ozone NAAQS. In 1980, EPA

approved Massachusetts' proposed non-attainment area state implementation plan. This SIP required the painting operations at petitioner's Framingham automobile assembly plant to meet increasingly stringent limits on emissions of volatile organic compounds (VOC), which contribute to ozone. Full compliance was required by December 31, 1985. Pet. App. 6a.

On October 20, 1981, EPA published a policy statement discussing the automobile industry's conversion from lacquer paints to basecoat/clearcoat (BC/CC) technology, as a means of reducing VOC emissions. 46 Fed. Reg. 51,38[illegible]. EPA stated that it would entertain proposed SIP revisions intended to allow automakers until as late as the end of 1986 to install new painting technology, with some plants requiring until 1987 to convert. *Id.* at 51,387. Petitioner submitted requests consistent with the policy statement for three of its assembly plants, but not for its Framingham plant. More than three years later, in November 1984, petitioner submitted to Massachusetts a request to extend the December 31, 1985, compliance date to give petitioner additional time to install emission controls on the lacquer coating lines. In June of 1985, however, petitioner changed its plans and proposed converting the plant to BC/CC by the summer of 1987. On December 30, 1985, one day before the final compliance deadline in the SIP, Massachusetts submitted to EPA a proposed SIP revision extending petitioner's compliance date to the summer of 1987. Pet. App. 6a-7a.

EPA's Region I office began reviewing the proposed SIP revision while negotiating with petitioner and the State in an attempt to resolve petitioner's noncompliance with the existing SIP by means of a delayed compliance order under Section 113(d) of the

Act, 42 U.S.C. 7413(d). The negotiations proved fruitless, however. On July 2, 1986, EPA Region I sent a draft proposal to disapprove the SIP revision to EPA Headquarters. Pet. App. 7a. EPA's notice of proposed disapproval was published in the Federal Register on December 2, 1986. 51 Fed. Reg. 43,394. EPA pointed out (*ibid.*) that the proposed SIP revision failed to meet several of the criteria established in EPA's 1981 policy statement, and in particular failed to require the implementation of reasonably available control technology as expeditiously as practicable, as required by the Act. See Section 172(b)(2), 42 U.S.C. 7502(b)(2). On June 30, 1987, following the receipt of public comment on the proposed SIP revision, Region I transmitted to EPA Headquarters a draft of a final decision disapproving the proposed SIP revision. EPA published its final decision disapproving the proposed SIP revision on September 16, 1988. Pet. App. 7a-8a.

3. On August 17, 1987, the United States filed an action against petitioner under Section 113 of the Act, 42 U.S.C. 7413, to enforce the existing SIP's 1985 deadline. Pet. App. 7a-8a. At that point, EPA had published its proposed disapproval of the SIP revision, but EPA headquarters had not yet acted on Region I's draft final decision of disapproval. The complaint alleged violations by petitioner of the VOC emission standards of the existing SIP from January 1, 1986, until petitioner shut down the plant in the summer of 1987 to convert to the new basecoat/clearcoat process. On petitioner's motion, the district court dismissed the action. The district court construed Section 110(a)(3)(A) of the Act to impose a four-month time limit on EPA's review of SIP revisions, and held that EPA was barred from enforcing

the existing SIP once the four months had passed. Pet. Supp. App. SA1-SA7.

The court of appeals reversed and remanded. The court agreed with the district court that the four-month deadline explicitly imposed by the Act on EPA's review of original SIPs should also apply to the review of SIP revisions. Although it found the question "a close one" (Pet. App. 11a), the court concluded that Congress would not have wanted the States' policy choices "to be held hostage to the EPA's schedule" (*id.* at 12a). The court noted that, "by imposing a four-month deadline on the EPA," it avoided "the possibility that the Agency would have assigned a lower priority to SIP revisions from First Circuit states than to those from states in circuits that had imposed a deadline" (*ibid.*).

The court of appeals refused, however, to follow the Fifth Circuit's holding in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (1987), that EPA is barred from enforcing an existing SIP when EPA takes more than four months to act on a proposed SIP revision. The court reasoned that an enforcement bar was too drastic a remedy for agency delay, especially since it penalized the public's interest in clean air, rather than the agency (Pet. App. 14a). The court also found it likely that EPA would frequently need longer than four months to issue a considered ruling, and would therefore miss the deadline even with the incentive of an enforcement bar (*id.* at 13a-14a). At the same time, the court rejected the D.C. Circuit's alternative approach. As the court explained, the D.C. Circuit had held that, if a SIP revision is ultimately rejected, "penalties may be assessed retroactively, with interest, for the entire period after the deadline" (Pet. App. 13a, citing

Duquesne Light Co. v. *EPA*, 698 F.2d 456 (1983)). Seeking to "steer a middle course between these two extremes" (Pet. App. 14a), the court concluded that the appropriate remedies for agency inaction were (1) a suit to compel agency action unreasonably delayed; or (2) a request by the subject of an enforcement proceeding for reduction or elimination of penalties during any period in which unreasonable agency delay resulted in prejudice (*id.* at 14a-15a). The court stated that the agency's failure to act within four months would not necessarily be unreasonable (*id.* at 15a).

The court remanded the case to the district court for further proceedings, and specified that, "if on remand in this case, the district court finds that [petitioner] was prejudiced by the Agency's lengthy review and that the delay was not justified or that some portion of the delay was not justified, it may reduce the penalties in a manner it sees fit." Pet. App. 15a. The court further observed that petitioner is free to raise a variety of issues "concerning the equities of this case" before the district court on remand. *Id.* at 17a.

ARGUMENT

The court of appeals correctly vacated the district court's dismissal of the government's enforcement action. If we assume for present purposes that a four-month limit does apply to EPA's review of SIP revisions, the court of appeals properly concluded that enforcement of the existing SIP is not barred if EPA's consideration of the SIP revision takes longer than four months. Although the enforcement bar ruling conflicts with the rationale of *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), and although the issues raised by petitioner are not in-

substantial, we submit that granting review would not be appropriate at this time because further proceedings in the district court may affect the outcome of the case and because Congress is considering amendments to the Clean Air Act which could resolve, or at least significantly alter, the contours of the enforcement bar issue.

1. As the court of appeals recognized (Pet. App. 5a), Section 110(a)(3)(A), which governs review of SIP revisions, does not impose an explicit time limit on the agency's review.[1] Nevertheless, the court below, explicitly stating that the States in the First Circuit thus would not be disadvantaged, agreed with the rule adopted in three other circuits and applied the four-month time limit for consideration of original SIPs to EPA's consideration of SIP revisions (Pet. App. 11a-12a). See *American Cyanamid Co.*, 810 F.2d at 495 (four-month limit applies to SIP revisions); *Council of Commuter Orgnizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986) (same); *Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d 648, 651 n.2 (2d Cir. 1982) (same); *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983) (same); but see *United States* v. *National*

[1] Although the four-month limit issue is not presented in the petition, the court's holding that there is such a limit forms a necessary predicate for petitioner's argument that enforcement is barred after four months. If the Court grants the petition, it will be permissible for the United States to argue, as an alternative ground for upholding the court of appeals' judgment reversing the dismissal of the enforcement action, that there is no four-month time limit for EPA review of SIP revisions. *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977). Because the court of appeals' present decision is interlocutory, the United States could also present that question to this Court in a petition from a final judgment.

Steel Corp., 767 F.2d 1176, 1182-1183 n.1 (6th Cir. 1985) (four-month limit does not apply to SIP revisions).[2] Although Section 110(a)(3)(A) says only that the revised SIP must meet the requirements of Section 110(a)(2), the courts (except for the Sixth Circuit) have found an implied requirement that EPA meet the four-month limit found in Section 110(a)(2). In view of the fact that the statutory language does not provide a four-month deadline, and in view of the fact that Congress was explicit about other deadlines in the Clean Air Act, the application of the Section 110(a)(2) deadline for initial agency approval of SIPs as a Section 110(a)(3)(A) deadline for subsequent agency review of SIP revisions is unwarranted.

Sound reasons support the difference in applicable deadlines suggested by the language of the statute. SIP revisions frequently involve relaxation or delay of strict emission control requirements, which, given their sheer number and complexity (as well as the requirement for notice and comment), cannot realistically be processed so quickly. See Pet. App. 14a ("EPA inevitably will often miss the deadline."). A four-month deadline is not necessary to uphold the States' role in the process; the Administrative Procedure Act itself requires agencies to conclude matters "within a reasonable time" (5 U.S.C. 555(b)) and

[2] The Sixth Circuit is presently considering the United States' appeal from a decision holding, despite the Sixth Circuit's *National Steel* decision, that the four-month limit applies to EPA's review of SIP revisions, and that enforcement of the existing SIP is barred after the four month period passes. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280 (W.D. Ky. 1988), appeal pending, No. 88-6300 (argued Aug. 3, 1989).

provides a remedy for agency action "unreasonably delayed." 5 U.S.C. 706(1); *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980). As a threshold matter, then, we do not agree with the court of appeals' interpretation imposing a four-month deadline on EPA's SIP revision determination; the lack of a deadline in the statute, however, provides an alternative ground for defending the judgment of the court of appeals.

2. If the Section 110(a)(2) deadline does apply to Section 110(a)(3)(A) revisions, the court of appeals correctly concluded that EPA's failure to meet the deadline should not lead to an absolute bar of enforcement actions for violations of the original SIP in the interval between the end of the four-month deadline and the agency's action on the revision. The statute does not address the enforcement consequences of the EPA's failure to act within a specified period, and the court found no "indication from Congress that the public was to bear the brunt of the Agency's failure to observe a deadline." Pet. App. 16a. The court noted that Section 113(b) permits a court, in assessing penalties, to "'take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation'" (Pet. App. 15a) and concluded that "giving the district court the power to adjust the penalties will provide the Agency with the necessary incentive to act without unreasonable delay" (*id.* at 15a-16a).

The court of appeals' analysis comports with the statute. The statute states that EPA may bring an action for penalties and injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2), 42

U.S.C. 7413(b)(2). Without question, the existing SIP remains the "applicable" plan even after the State has submitted a proposed revision. See Section 110(d), 42 U.S.C. 7410(d); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. at 92; *American Cyanamid Co.*, 810 F.2d at 495; *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir.), cert. denied, 484 U.S. 822 (1987); *Duquesne Light Co.*, 698 F.2d at 471. Thus, barring enforcement actions after the four-month deadline would create a category of immunity from Section 113 enforcement actions that the statute itself does not envision.

The court of appeals properly rejected the conclusion of the Fifth Circuit, in *American Cyanamid Co.*, that barring enforcement of the applicable SIP if EPA has not acted on a proposed revision within four months would further the purposes of the Act. The Fifth Circuit concluded that an enforcement bar was necessary to penalize EPA for "contumaciousness," to preserve the role of the States under the Act, and to assure even-handed consideration of SIP revision requests. *American Cyanamid Co.*, 810 F.2d at 499. The court of appeals here persuasively rebutted each of the Fifth Circuit's policy justifications for an enforcement bar. The penalty rationale fails because "[i]f the EPA cannot enforce existing standards, it is the public and not the EPA that is hurt" (Pet. App. 14a). The federalism rationale is equally flawed, because an enforcement bar may not be in the States' interest (as Massachusetts itself recognized here (*id.* at 16a)), and because the alternative remedies suggested by the court "ensure that the interests of the state need not yield too far" (*ibid.*). The speculative possibility that an enforcement action could

undermine even-handed administration and influence the outcome of the final decision on a SIP revision stems not from agency delay but from Congress's decision to assign both enforcement and SIP review responsibilities to the same agency (*id.* at 16a-17a). In addition, Congress provided an adequate remedy for anyone aggrieved by an allegedly biased decision by providing for review of final agency decisions in the courts of appeals. § 307(b)(1), 42 U.S.C. 7607(b)(1). Indeed, GM has invoked that remedy here (Pet. App. 17a). Thus, as the court of appeals concluded, an enforcement bar is not necessary to further the purposes of the Act.

An enforcement bar, moreover, may have serious adverse consequences. It could encourage industries to propose last-minute SIP revision proposals for the purpose of staying EPA enforcement actions and postponing compliance with SIP provisions which Congress required to be achieved within the deadlines set forth in the Act and the SIPs themselves. If existing SIPs cannot be enforced by EPA, noncomplying sources in States that propose revisions will gain unfair advantage over those in other States, and the public will suffer from further delays in attainment of national air quality standards, contrary to Congress's clear intent. See, *e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 71-72 (1977).[3]

[3] The facts of this case illustrate the negative results of an enforcement bar. Petitioner had more than ample time (five years) to bring its plant into compliance with the emission limits of the 1980 SIP either by installing control devices on its lacquer coating lines or by converting to the basecoat/clearcoat process without undue delay. Instead of making the investment necessary to achieve this result, petitioner waited until shortly before the deadline to propose a solution (the basecoat/clearcoat process) that would require a further one and one-half-year extension of the SIP time limits. Allowing petitioner to follow this course of conduct without penalty would ignore the damage to the public interest caused by the one and one-half-year delay in reaching the stricter emission limits, and would give petitioner an economic advantage over companies that made the investments necessary to meet applicable limits in a timely fashion.

A more fundamental defect in the approach adopted by the Fifth Circuit and advocated by petitioner is its misconception of the nature of the courts' role. Congress provided for enforcement of the "applicable" SIP (42 U.S.C. 7413(b)(2)), and made no exception for the situation in which a proposed revision has been pending for more than four months. It is not the province of the judiciary to carve out such an exception based on notions of "what accords with 'common sense and the public weal.'" *TVA* v. *Hill*, 437 U.S. 153, 195 (1978). Cf. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) ("The question * * * is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended * * *."). As this Court stated in *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) (footnote omitted): "When * * * there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." Less drastic remedies are available here (Pet. App. 14a-15a). Thus, even if we assume that there is a four-month deadline, the court below was correct in rejecting the *American Cyanamid Co.* enforcement bar rule.[4]

[4] As the court of appeals noted (Pet. App. 16a n. 4), this case arose under Section 113 of the Act, 42 U.S.C. 7413, which explicitly directs the courts to consider a number of equitable factors before assessing a penalty; *American Cyanamid Co.* and *Duquesne Light Co.*, in contrast, arose under

3. Although the court of appeals' decision rejected the rationale of *American Cyanamid Co.*, and although the issue is of considerable importance, two factors counsel against review of the issue at this time. First, the court of appeals' decision is interlocutory. The remand to the district court—and possible further review by the court of appeals—may greatly clarify both the interests at stake in this litigation and the practical operation of the First Circuit's newly announced standard. Review at this stage, before the district court has had an opportunity to consider petitioner's claims regarding the "equities of this case" (Pet. App. 17a), would thus be premature.

Second, Congress is currently considering major amendments to the Clean Air Act. Several pending proposals address problems caused by application of a four-month limit to SIP revisions and adopt a time period of either twelve months or nine months for the review of SIP revisions.[5] Similarly, several of the

---

Section 120, 42 U.S.C. 7420, which provides a procedure for EPA to collect penalties for noncompliance, but does not expressly authorize the consideration of equitable factors. Thus it is possible that the apparent conflict between *American Cyanamid Co.* and the court of appeals in this case can be reconciled by viewing the different conclusions as resting on the different statutory provisions; neither court, however, limited its analysis in such a fashion. The Sixth Circuit is currently considering the enforcement bar issue in a proceeding in which the agency proceeded both under Section 113 and Section 120. *United States* v. *Alcan Products, Division of Alcan Aluminum Corp.*, No. 88-6300 (argued Aug. 3, 1989); see note 2, *supra*.

[5] Three bills would require EPA to act on a SIP revision within twelve months of EPA's certification that the proposed revision meets certain minimum criteria. See H.R. 99,

bills introduced this session contain explicit confirmation of EPA's power to enforce the existing SIP until the time when the proposed revision is actually approved.[6] Such statutory revisions, if enacted, may raise the question whether a previously granted writ of certiorari should be dismissed. *See Cook* v. *Hudson*, 429 U.S. 165, 165-66 (1976); *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497, 498-499 (1971) (Harlan, J., concurring); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955). It is also possible that a grant of certiorari at this time might affect congressional consideration of the clarification proposals, and of the need for them.[7]

101st Cong., 1st Sess. § 103 (1989); H.R. 3030, 101st Cong., 1st Sess. § 101(a)(1) (adding § 110(e)(2) to Clean Air Act) (1989); S. 1490, 101st Cong., 1st Sess. § 101(a) (adding § 110(e)(2) to Clean Air Act) (1989). One bill would allow EPA nine months to act on certain SIP revisions. H.R. 2323, 101st Cong., 1st Sess. § 401 (1989).

[6] S. 1630, 101st Cong., 1st Sess. § 104(b) (1989) is typical. It provides:

> SAVINGS CLAUSES AND ENFORCEABILITY OF PLANS.—Section 110(d) of the Clean Air Act is amended by adding the following at the end thereof: "Such term includes any portion of an implementation plan which has been submitted by a State and approved by the Administrator. Notwithstanding any other provision of this Act, each provision of such implementation plan (and each permit in effect under such plan) shall remain in effect, and shall be enforced under this Act, until a revision of such plan is approved by the Administrator or a plan is promulgated by the Administrator under subsection (c)."

Similar provisions are contained in H.R. 99, *supra*, (§ 303(f)) and in H.R. 2323, *supra* (§ 608(e)).

[7] In addition, EPA has recently made a number of administrative changes in its SIP review process which should

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

MARTIN W. MATZEN
DAVID C. SHILTON
Attorneys

NOVEMBER 1989

---

result in more expeditious decisions on SIP revision proposals. 54 Fed. Reg. 2214 (1989). These developments are likely to decrease, but probably will not eliminate, the number of instances in which EPA can be claimed to have exceeded a time limit. The changes include: review of proposed SIP revisions for completeness against specific criteria, and requiring prompt modification of incomplete submittals; delegation of decision authority to Regional Administrators for SIP actions that are not nationally significant; and providing for "grandfather[ing]" of SIP revisions that were prepared in good faith by a State but which may become deficient because of a change in EPA policy subsequent to state adoption. *Ibid.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 262203 589